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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959,

No. 673.

ROY L. WILLIAMS et al.,
Petitioners,

vs.

THE COOPERATIVE FARM CHEMICALS ASSOCIATION et al.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Kansas.

BRIEF OF RESPONDENTS IN OPPOSITION.

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Petitioners (called "defendants" herein) have misapprehended, overlooked, or ignored facts and circumstances which necessitate a denial of a writ of certiorari in this case. The additional portions of the record certified by plaintiffs-respondents demonstrate a lack of jurisdiction for want of a final judgment and for want of a live case or controversy involving a federal question.

SUPPLEMENTAL STATEMENT.

Defendants' statement ignores the controlling fact that the judgment or decree here involved granted a *temporary injunction.* After the temporary restraining order and order to show cause was issued at the outset by the trial court (R. 20[1]), the parties entered into a stipulation of facts for the purpose of enabling the trial court to rule on the order to show cause why a temporary injunction should not be granted. Defendant Union's demurrer in opposition to the issuance of the temporary injunction was based solely on the assertion that jurisdiction had been pre-empted to the National Labor Relations Board by the Labor Management Relations Act (R. 26-8). The trial court sustained the demurrer (R. 42-3), thus refusing to issue a temporary injunction. The Supreme Court of Kansas reversed the judgment and issued its mandate directed to the trial court. In accordance with the mandate, the trial court entered a Journal Entry dated December 24, 1959, granting a temporary injunction, "pending further hearing and order of this Court" (Resp. R. 1-3). The injunction was to be effective "until the hearing of said cause and application for permanent injunction and order therein" (Resp. R. 3).

Thereafter plaintiff, The Cooperative Farm Chemicals Association, filed in the cause a Dismissal dated January 18, 1960, which recited that defendants' acts had long since

1. Plaintiffs have not been supplied with a copy of the record. References to defendants' record are gleaned from defendants' statement where possible. References herein to proceedings in the trial court are to proceedings by plaintiff, The Cooperative Farm Chemicals Association, in the District Court of Douglas County, Kansas. Similar proceedings have been taken in Montgomery County, Kansas, where the Dismissal in behalf of plaintiff, Cooperative Refinery Association, is now pending.

been discontinued and there was no evidence of any intention on the part of defendants to renew them (Resp. R. 4).

The trial court treated plaintiff's dismissal as a "motion to dismiss" and required that the "motion" be heard by the court on February 4, 1960. At the hearing defendants' attorneys stipulated in open court that the original dispute which gave rise to the picketing had terminated while the temporary restraining order was still in effect, and that after the trial court sustained defendants' demurrer, neither the defendant Union nor any of its members at any time picketed plaintiff's plant (Resp. R. 5-6).

The trial court has the "motion" to dismiss under advisement.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

1. The decree is not final: The proceedings below involve only the question of plaintiffs' right to a temporary injunction and the proceedings culminated in temporary injunctions. Stipulations of facts were entered into in the trial court solely for the purpose of ruling on the jurisdiction of the court to issue a *temporary injunction*. The Supreme Court of Kansas, in reversing the judgment for defendants, determined that plaintiffs were entitled to temporary injunctions and temporary injunctions pending a hearing were issued in execution of that Court's mandate (Resp. R. 1). That there was no dispute as to the terms of the decree is evidenced by the approval of the Journal Entry as to form by defendants' counsel (Resp. R. 3). The cases are now pending on plaintiffs' Dismissal which would, of course, terminate the temporary injunction.

Under these circumstances, there is no final, reviewable decree which would sustain the jurisdiction of this

Court. *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co., Inc.*, 344 U.S. 178 (1952), is controlling. There, as here, a state court issued a temporary injunction. After hearing, the union's motion to dissolve the temporary injunction was denied (See 57 So.2d 112, 114). The union's motion there, as here, was based on the premise that the state court had no jurisdiction by reason of the pre-emption doctrine. The Supreme Court of Alabama affirmed the decree, leaving the temporary injunction intact. Certiorari was granted and then dismissed as improvidently granted. The Court held that the decree of the Supreme Court of Alabama was not a final judgment or decree within the meaning of 28 USCA, § 1257, because it merely granted a temporary injunction. The Court stated (pp. 180-181):

> "The distinction between a preliminary or temporary injunction and a final or permanent injunction was elementary in the law of equity. The classical concept was at once recognized and applied in *Gibbons* v. *Ogden*, *supra*. There is no room here for interpretation. The rule remains unchanged.
>
> True, as long as a temporary injunction is in force it may be as effective as a permanent injunction, and for that reason appeals from interlocutory judgments have been authorized by state legislatures and Congress. But such authorization does not give interlocutory judgments the aspect of finality here, even though we may have inadvertently granted certiorari. *Baldwin Co.* v. *Howard Co.*, 256 U.S. 35, 40.
>
> It is argued that if this is not held to be a final decree or judgment and decided now, it may never be decided, because to await the outcome of the final hearing is to moot the question and to frustrate the picketing. However appealing such argument may be, it does not warrant us in enlarging our jurisdiction. Only Congress may do that. Furthermore, the interlocu-

tory decree could have been readily converted into a final decree, and the appeal could have proceeded without question as to jurisdiction just as effectively and expeditiously as the appeal from the interlocutory injunction was pursued in this case."

To the same effect is *Williams et al.* v. *Quill et al.*, 303 U.S. 621 (1938), in which the Court dismissed an *appeal* from the denial of a temporary injunction by the state court for want of a final judgment.

2. There is no actual controversy concerning any federal issue: After the issuance of the temporary injunction herein, plaintiffs filed Dismissals of the actions which would, of course, automatically terminate the temporary injunctions. It was stipulated in open court that the basic controversy which provoked the picketing had been settled, and that there had been no picketing at plaintiff's plant at any time since the district court had sustained the demurrer to the evidence on October 3, 1958, sixteen months prior to the hearing on the dismissal (R. 42-3; Resp. R. 5-6).[2]

These developments demonstrate the absence of any live controversy involving a federal question which would be reviewable by this Court. The conditions which gave rise to the controversy have changed completely. Plaintiffs dismissed because conditions were so changed as to make a temporary injunction unnecessary and meaningless. Termination of the temporary injunctions will give defendants all the relief they have sought. The federal question is wholly academic. The mere threat of future Union activity (Resp. R. 6), does not render the controversy any

2. The decree granting a temporary injunction was issued to comply with the mandate of the Supreme Court of Kansas. Defendants have never sought a stay of proceedings.

less moot. *Local No. 8-6, Oil, Chemical & Atomic Workers International Union, AFL-CIO,* v. *Missouri,* U.S. , 28 LW 4095 (1960).

The defendants have frankly conceded that dismissal of the case will render this controversy moot. In their brief in the district court in opposition to dismissal defendants state (pp. 11-12):

> "It is clear that granting the motion to dismiss would moot the injunctive features of the case regardless of the propriety or the power of the court to grant such a motion. *U. S.* v. *Shipp,* 203 U.S. 563, 573-574; *Director of Prisons* v. *Court of First Instance,* 239 U.S. 633, 634."

This concession destroys defendants' right to seek certiorari. The additional Union contention in the district court that the separate judgment for damages in this case would independently support a petition for writ of certiorari (Br. 12) has no merit and finds no support in the cases cited by the Union.[3]

In this case, damages were sought (R. 39) and granted (R. 44-5) *under the state law of Kansas.* Any damage issue in this case is simply an issue of state law. This the Union impliedly concedes, for its Petition does not seek review of the damage question or assign it as a reason for granting the writ.

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3. *Tullock* v. *Mulvane,* 184 U.S. 497, 509-514, involving liability on an injunction bond in connection with injunction proceedings brought in Federal Court. The Court specifically held that liability on the bond was a federal question (see p. 504).

Textile Workers Union v. *Lincoln Mills,* 353 U.S. 448, 459, was a suit in Federal District Court to compel arbitration under Sec. 301(a) of the Labor Management Relations Act of 1947. Again, the Supreme Court held that the damage questions involved in the case were questions of federal law (p. 456).

The alleged pendency of incidental damage issues can not give life to the present petition. See *Alejandrino* v. *Quezon*, 271 U.S. 528, 533 (1926).

To paraphrase the Court's language in *Local No. 8-6, Oil, Chemical & Atomic Workers International Union, AFL-CIO*, v. *Missouri*, U.S. , 28 LW 4095, 4097 (1960), any judgment herein "'would be wholly ineffectual for want of a subject matter on which it could operate. * * * [A reversal] would ostensibly require something to be done which had already taken place. * * * To adjudicate a cause which no longer exists is a proceeding which this Court has uniformly refused to entertain.'"[4]

See also to the same effect: *United States* v. *International Union, United Mine Workers of America*, 190 F.2d 865, 872-3 (D.C. Cir. 1951); *Minn. & St. L. Ry. Co.* v. *Pacific Gamble Robinson Co.*, 181 F.2d 812, 814 (8th Cir. 1950). Cf. *Hershel California Fruit Products Co.* v. *Hunt Foods, Inc.*, 221 F.2d 797 (9th Cir. 1955).

3. No novel or important questions are involved: Assuming *arguendo* that jurisdiction to review the judgment by certiorari exists, defendants have demonstrated no compelling considerations which would warrant the issuance of the writ in this case, particularly in view of the circumstances already discussed. The Supreme Court of Kansas in this case recognized and applied the decisions of this Court in the *Garner, Weber, Gonzales, Garmon* line of cases. It ruled that the "activity" disclosed by the stipulated facts was neither protected nor prohibited by federal law, ap-

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4. This is *not* a situation in which the Union, opposed by the company, seeks dissolution of a permanent injunction against it on the ground that the underlying controversy has been settled. Here, the company, and presumably the Union also, desire to terminate a temporary injunction.

parently basing its decision on what it deemed to be "compelling precedent applied to essentially undisputed facts". *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 246 (1959).

The state court, of course, had not only the right but the duty to determine the question of its own jurisdiction. See *Amalgamated Clothing Workers of America* v. *Richman Bros. Co.*, 348 U.S. 511 (1955). Defendants' contention seems to be that where, as here, the state court bases its ruling on federal precedent, the *Garmon* decision compels it to look only to Board decisions, even though those decisions have been reversed by the courts of appeal and are not the law. The implication that such discredited Board decisions are controlling misinterprets *Garmon* and would make a mockery of the statutory judicial review of administrative rulings of the Board.

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5. *Garmon*, of course, involved activity which had been adjudicated to be an 8(b)(2) unfair labor practice. Further, the Court recognized a residual state power to regulate conduct touching interests deeply rooted in local feeling and responsibility (p. 244).

CONCLUSION.

No final decision in an existing case or controversy is involved in this case, and the petition for certiorari should be denied.

Respectfully submitted,

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